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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                        |  |
|------------------------|--|
| Proceeding             | 92063133   |
| Party                  | Defendant<br>Astro Pak Corporation   |
| Correspondence Address | ASTRO PAK CORPORATION<br>270 EAST BAKER STREET, SUITE 100<br>COSTA MESA, CA 92626<br>UNITED STATES |
| Submission             | Answer   |
| Filer's Name           | Alexis Dillett Isztwan   |
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| Signature              | /Alexis Dillett Isztwan/   |
| Date                   | 03/18/2016   |
| Attachments            | ANSWER TO PETITION FOR CANCELLATION NO 92063133<br>(00910650x9E1D6).pdf(281256 bytes )             |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

|                                     |   |                            |
|-------------------------------------|---|----------------------------|
| TOMI ENVIRONMENTAL SOLUTIONS, INC., | : |                            |
|                                     | : |                            |
| Petitioner,                         | : | MARK: iHP                  |
|                                     | : |                            |
|                                     | : | Registration No. 3,917,962 |
| v.                                  | : |                            |
|                                     | : |                            |
| ASTRO PAK CORP.,                    | : | Cancellation No.: 92063133 |
|                                     | : |                            |
| Respondent.                         | : |                            |

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**ANSWER AND AFFIRMATIVE DEFENSES  
TO PETITION FOR CANCELLATION**

Registrant and Respondent Astro Pak Corp. (“**Registrant**”), by and through its attorneys, Semanoff Ormsby Greenberg & Torchia, LLC, hereby responds to TOMI Environmental Solutions, Inc.’s (“**TOMI**”) Petition for Cancellation of Registration No. 3,917,962 (“**Petition**”), for the iHP mark, and assert their affirmative defenses as follows:

**Petitioner and Its Patented Technology and Products**

1. Denied. After reasonable investigation, Registrant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in this Paragraph 1 of the Petition, except that Registrant admits that they are informed and believe that TOMI provides services in the decontamination and infectious disease control industry.
2. Denied. Registrant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 2 of the Petition.
3. Denied. Registrant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 3 of the Petition.

### **Registrant's Trademark Registration**

4. Admitted.
5. Admitted only that the phrase "ionized hydrogen peroxide" was not mentioned in Registrant's application. The remaining averments of Paragraph 5 are denied.
6. Denied. After reasonable investigation, Registrant is without knowledge or information sufficient to form a belief as to nature of the truth of the averments contained in Paragraph 6 of the Petition.
7. Admitted only that L3 and TOMI supplied equipment and a chemical solution to SixLog. The remaining averments of Paragraph 7 are denied.
8. Denied.
9. Admitted.
10. Denied as stated. The specimen is in writing and speaks for itself, and TOMI's characterization of the document is incomplete and inaccurate.
11. Admitted.

### **FIRST GROUND FOR CANCELLATION OF REGISTRATION Genericness**

12. Registrant incorporates by reference the foregoing answers to Paragraphs 1 through 11 inclusive of the Petition as if fully set forth herein.
13. Admitted only that "ionized hydrogen peroxide" is abbreviated as "IHP". The remaining averments of Paragraph 13 are denied.
14. Denied.
15. Denied.

16. Denied. Registrant is without knowledge or information sufficient to form a belief as to purchasers' subjective beliefs about the meaning of the phrase. The remaining averments of Paragraph 16 are denied.

17. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments. By way of further answer, the phrase "ionized hydrogen peroxide" is not the mark at issue in this matter.

18. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

**SECOND GROUND FOR CANCELLATION OF REGISTRATION**  
**Lack of Distinctiveness**

19. Registrant incorporates by reference the foregoing answers to Paragraphs 1 through 18 inclusive of the Petition as if fully set forth herein.

20. Admitted only that "ionized hydrogen peroxide" is abbreviated as "IHP". The remaining averments of Paragraph 20 are denied.

21. Denied.

22. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments. By way of further answer, the phrase "ionized hydrogen peroxide" is not the mark at issue in this matter.

23. Denied.

24. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

25. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

26. Admitted only that Registrant has a right to exclude others from making descriptive use of its registered trademark, "iHP". The remaining averments of Paragraph 26 are denied.

27. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

**THIRD GROUND FOR CANCELLATION OF REGISTRATION**  
**Failure to Function as a Service Mark**

28. Registrant incorporates by reference the foregoing answers to Paragraphs 1 through 27 inclusive of the Petition as if fully set forth herein.

29. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

30. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

31. Denied. By way of further answer, Registrant has at all relevant times used the iHP mark as a source identifier for its services.

32. Denied. By way of further answer, Registrant has at all relevant times used the iHP mark as a source identifier for its services.

33. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

34. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

#### **FOURTH GROUND FOR CANCELLATION OF REGISTRATION Unlawful Use**

35. Registrant incorporates by reference the foregoing answers to Paragraphs 1 through 34 inclusive of the Petition as if fully set forth herein.

36. Denied.

37. Denied.

38. Denied.

39. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

40. Denied as a conclusion of law to which no responsive pleading is required. If and to the extent that a responsive pleading is deemed to be required, Registrant denies the averments.

WHEREFORE, Registrant respectfully demands judgment in its favor, the dismissal of the Petition for Cancellation in its entirety and other such relief as the TTAB deems appropriate.

## **AFFIRMATIVE DEFENSES**

### **First Affirmative Defense**

Petitioner's claims are barred in whole or in part because the Petition fails to state a claim for which relief may be granted.

### **Second Affirmative Defense**

Petitioner's claims are barred in whole or in part because Petitioner has not been, is not, and will not be damaged by the continuing registration of Registrant's iHP mark.

### **Third Affirmative Defense**

Petitioner's claims are barred in whole or in part because Petitioner has failed to specifically state and cannot specifically state any special damages by virtue of the acts complained of in the cancellation petition herein.

### **Fourth Affirmative Defense**

Petitioner's claims are barred in whole or in part by the doctrine of unclean hands.

### **Fifth Affirmative Defense**

Petitioner's claims are barred in whole or in part because of Petitioner's infringement of Registrant's mark.

### **Sixth Affirmative Defense**

Petitioner's claims are barred in whole or in part by the doctrine of acquiescence.

#### **Seventh Affirmative Defense**

Petitioner's claims are barred in whole or in part because Registrant's iHP mark is suggestive, not descriptive.

#### **Eighth Affirmative Defense**

Petitioner's claims are barred in whole or in part because, even if the Board concludes that Registrant's iHP mark is descriptive, the mark has acquired secondary meaning pursuant to 15 U.S.C. § 1052(f), and therefore the registration is valid and enforceable.

#### **Ninth Affirmative Defense**

Petitioner's claims are barred in whole or in part by the doctrines of waiver and estoppel.

#### **Tenth Affirmative Defense**

Petitioner's claims are barred in whole or in part by the doctrine of laches.

#### **Eleventh Affirmative Defense**

Petitioner's claims are barred in whole or in part due to Petitioner's misuse of these proceedings solely as a means to force Registrant to agree to Petitioner's separate unreasonable demand for assignment of Registrant's registration and settlement in connection with ongoing settlement discussions in a related dispute.



WHEREFORE, Registrant respectfully demands judgment in its favor, the dismissal of the Petition for Cancellation in its entirety and other such relief as the TTAB deems appropriate.

Respectfully submitted,

SEMANOFF ORMSBY  
GREENBERG & TORCHIA, LLC

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Attorneys for Registrant/Respondent

Astro Pak Corp.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Answer and Affirmative Defenses to Petition for Cancellation to be served on counsel for Petitioner by United States first-class mail, postage prepaid as follows:

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Alexis Dilleth Isztwan, Esquire

March 18, 2016  
Date